No. 484

Supreme Court of the United States

October Term, 1922.

THE MATTHEW ADDY COMPANY,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

Motion and Petition for Writ of Certiorari and Supporting Brief.

NELSON B. CRAMER,
JULIUS R. SAMUELS,
Cincinnati, Ohio.
Counsel for
The Matthew Addy Company,
Petitioner.

COURT REPORTER PRESS, 845-849 Main Street, Cincinnati, O.

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MOTION FOR WRIT OF CERTIORARI.

Comes now The Matthew Addy Company by Nelson B. Cramer and Julius R. Samuels, its counsel, and moves this Honorable Court that it shall by certiorari or by other proper process, directed to the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit, require said court to certify to this court for its review and determination that certain cause in said Circuit Court of Appeals lately pending, in which The Matthew Addy Company was plaintiff in error and the United States of America was defendant in error. and petitioner herein to that end, now tenders herewith its petition and brief with a certified copy of the entire record in said cause pending in said Circuit Court of Appeals for the Sixth Circuit.

NELSON B. CRAMER,
JULIUS R. SAMUELS,
Counsel for The Matthew Addy Company,
Petitioner.

No. ———.

Supreme Court of the United States

October Term 1922.

THE MATTHEW ADDY COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH DISTRICT.

The petition of The Matthew Addy Company for a writ of certiorari directed to the Circuit Court of Appeals for the Sixth Circuit, requiring it to certify to the Supreme Court of the United States the case of The *Matthew Addy Company* v. *United States of America*, lately pending in said Circuit Court of Appeals for the Sixth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Said petitioner respectfully shows to the court as follows:

I. That it is and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Ohio, with its principal place of business at Cincinnati, in said State of Ohio.

II. That the grand jurors for the United States of America, impanelled and sworn in the District Court of the United States for the Western Division of the Southern Judicial District of Ohio, at the October, 1919, term thereof, to-wit, on November 17, 1919, presented an indictment against petitioner, which indictment was in twenty-three counts, and which alleged under the Act of Congress of August 10, 1917 (40 Stat., 278), commonly known as "The National Defense (Lever) Act" and especially sections 1, 2, 3, 4 and 25 thereof, and the executive order of the President of the United States, dated August 23, 1917, that the President being authorized by the terms of said Act to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment and storage thereof among dealers and consumers, on August 23, 1917, issued an executive order in which it was provided among other things that:

> "1. A coal jobber is defined as a person (or other agency) who purchases and re-sells coal to coal dealers or to consumers without physically handling it on, over or through his own vehicle, dock, trestle or yard.
>
> "2. For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15c per ton of 2,000 lbs., nor shall the combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal, exceed 15c per ton of 2,000 lbs."

The indictment then alleged that during the months of September, October and November, 1917, a state of war then existing between the United States and the Imperial German Government, and the law, orders and regulations above stated being then in force, defendant, The Matthew Addy Company, was engaged, in the business in the City of Cincinnati, Hamilton County, Ohio, as a coal jobber, as defined in said executive order.

That said The Matthew Addy Company, acting in its capacity as a coal jobber as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive of divers persons named in the various counts for certain quantities of bituminous coal, certain prices, which prices included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber as aforesaid of 25c per ton, and which said profit or margin of 25c per ton was, and was well known by said The Matthew Addy Company to be in excess of the profit or gross margin of 15c per ton of 2,000 lbs. permitted by the law, executive order, and regulations above referred to, to be added to the purchase price of said jobber; and that said The Matthew Addy Company did not have any contract with said parties named, made in good faith, prior to the 23d day of August, 1917, in which said contract the price for the purchase and sale of said coal was fixed, etc. (R., 4).

III. Motion to quash the indictment (R., 29) and demurrer to the indictment (R., 33) were overruled prior to the trial.

IV. A trial was had before the court and a jury on June 2, 1920, and a verdict of guilty was rendered in the manner and form as charged in counts Nos. 2, 5, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18 and 20, and not guilty as

charged in the remaining counts thereof, 1 and 4 (R., 38); counts 3, 6, 8, 14, 19, 21, 22, and 23 were withdrawn from the jury. The case of The Matthew Addy Company and that of Benjamin N. Ford, Vice-President of said Company who was separately indicted, were tried together before the court and a jury and separate verdicts rendered by the jury in each case.

V. In the course of the trial, petitioner called as a witness on its own behalf, one Frank C. Deckebach, who qualified as a Certified Public Accountant (R., 75). Petitioner proffered in evidence a "statement of tonnage and expense of coal sales and cost in cents per ton" for the calendar years, 1917, 1918, and 1919 (defendant's Exhibit "C," R., 116-123), in order that the witness might explain the same; to which counsel for the government objected and which objections were sustained by the court and exceptions noted (R., 78, 79 and 80).

VI. Motions for a new trial and in arrest of judgment were overruled (R., 37 and 40) and sentence pronounced on June 24, 1920, fining petitioner the sum of One Thousand ($1,000) Dollars and costs (R., 38).

VII. A writ of error was allowed from the United States Circuit Court of Appeals for the Sixth Circuit, and a transcript of the record filed in said court.

VIII. Said cause came on for hearing on error proceedings before the United States Circuit Court of Appeals for the Sixth Circuit, on March 7, 1922, and was submitted to the court, and on May 4, 1922, the said United States Circuit Court of Appeals for the Sixth Circuit, affirmed the judgment of the trial court (R., 128).

IX. Your petitioner believes that the said Circuit Court of Appeals for the Sixth Circuit erred in affirming

the judgment of the District Court, and should have reversed the said District Court and discharged the defendant.

X. And your petitioner further avers that the present case is one in which it is proper for this court to issue a writ of certiorari for the following reasons, among others, to-wit:

1. The questions of law involved in this case are questions involving the constitution and laws of the United States, and especially involving the validity of the Act of Congress of August 10, 1917 (40 Stat., 278), which was one of the most important of the war legislation passed by Congress during the late war.

2. The construction of the Act of Congress of August 10, 1917, affects the coal industry which is national and international in scope.

3. The Circuit Court of Appeals was in error in affirming the judgment of the District Court in construing the Act of Congress of August 10, 1917, and the rules and regulations of the President and the United States Fuel Administrator as it did.

4. The Circuit Court of Appeals was in error in affirming the judgment of the District Court in upholding the validity of the Act of Congress of August 10, 1917, and the rules and regulations of the President and the United States Fuel Administrator.

5. The Court of Appeals was in error in affirming the judgment of the District Court in holding that "public danger warrants the substitution of executive process for judicial process," and in so doing in substance held that the existence of a state of war suspends the operation upon the power of Congress of the guarantees and limitations of the fifth amendment to the constitution.

6. The decision of the Court of Appeals affirming the District Court is at variance with the principles laid down by this court in the case of *United States* v. *Cohen Grocery Company*, 255 U. S., 81-89.

Wherefore, your petitioner prays that this honorable court will grant a writ of certiorari directed to the Circuit Court of Appeals for the Sixth Circuit, requiring that the record of said case in said court, and its judgment be certified to this court, and that this court will thereupon proceed to correct the errors complained of, reverse said judgment, and enter final judgment and discharge petitioner, and for such further proceedings as to this honorable court may seem just and proper in the premises.

THE MATTHEW ADDY COMPANY,
By NELSON B. CRAMER,
JULIUS R. SAMUELS,
Its Counsel.

United States of America, State of Ohio, County of Hamilton, ss.:

Nelson B. Cramer, being first duly sworn, deposes and says that he is counsel for The Matthew Addy Company, the petitioner herein; that he has read the foregoing petition, and is familiar with its contents and that the allegations contained therein are true as he verily believes; and further that in his opinion said petition is well founded and that the case is one in which the prayer of the petitioner should be granted by this court.

NELSON B. CRAMER,

Sworn to before me and subscribed in my presence, this 3rd day of July, 1922.

ARTHUR W. GORDON,

(Seal) Notary Public, Hamilton County, Ohio.

My commission expires November 26, 1923.

Supreme Court of the United States

October Term, 1922.

THE MATTHEW ADDY COMPANY,
Petitioner.

against

UNITED STATES OF AMERICA,
Respondent.

Brief in Support of Petition for Writ of Certiorari

NELSON B. CRAMER,
JULIUS R. SAMUELS,
Cincinnati, Ohio.
Counsel for
The Matthew Addy Company,
Petitioner.

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No. ———.

Supreme Court of the United States

October Term 1922.

THE MATTHEW ADDY COMPANY,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

Petitioner prays for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit, requiring that said cause in said court, and its judgment be certified to this court, to secure reversal of the judgment of said court affirming the judgment of the District Court of the United States for the Southern District of Ohio, Western Division, wherein a verdict of guilty was returned by a jury in said court against petitioner on an indictment based on the Act of Congress of August 10,

1917 (40 Stat. 278) commonly known as "The National Defense (Lever) Act" and the executive order of the President of the United States, dated August 23, 1917 (compilation of Rules, Regulations and Promulgations of the United States Fuel Administrator, Harry A. Garfield.)

The facts of the case are succintly but comprehensively stated in the petition for a writ of certiorari set out in the forepart of this pamphlet.

Petitioner invokes the exercise by this court of its power to issue a writ of certiorari herein for the following reasons, among others, to-wit:

(a) The questions of law involved in this case are questions involving the constitution and laws of the United States, and especially involving the validity of the Act of Congress of August 10, 1917 (40 Stat. 278) and the rules, regulations and promulgations ofthe President of the United States and the United States Fuel Administrator acting under the direction of the President, which were among the most important of all the war legislation passed by Congress during the late war.

(b) The proper construction of the Act of Congress of August 10, 1917 and the rules and regulations of the President of the United States and the Fuel Administrator will serve as a landmark in the development of the constitutional law of this country, and as a guide to Congress and executive and administrative officers of the United States, as to the powers that may be exercised by them during an emergency consistent with the constitutional limitations upon their powers.

(c) The decision of the Court of Appeals affirming the District Court is at variance with the principles of con-

stitutional law laid down by this court in *Ex Parte Milligan*, 4 Wall. 2, 121-127; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156 and the very recent case of *United States* v. *Cohen Grocery Co.* 255 U. S. 81, 88-89.

(d) The proper construction of the Act of Congress of August 10, 1917 and the rules and regulations of the President of the United States and the Fuel Administrator directly affect the coal industry of the United States, which is both national and international in scope, as well as the industries involving the production, distribution and consumption of foods and fuel throughout the United States.

SPECIFICATIONS OF ERROR.

The assignment of errors alleged to have been committed by the District Court appear at R. 93.

The first error and fundamental question is raised by the seventh assignment which is as follows:

> "In charging the jury that defendant might be found guilty for violation of the order of the President of August 23, 1917, although the undisputed evidence showed that in respect to each transaction covered by the indictment, the coal had been purchased by The Matthew Addy Company prior to that day, and prior to August 10, 1917."

Second, the court erred in not permitting defendant to prove that the gross margin of 15 cents per ton added to its purchase price, "was confiscatory and compelled defendant to dispose of its product without allowance for expense and a just compensation for its services" (See R. 79 and Assignments of Error, 3 and 6, R. 94).

Third, the court erred in overruling the motion of defendant to quash the indictment and each and every count thereof, for the reasons urged.

Fourth, the court erred in overruling the claims of defendant that the statute and the executive order, upon which the indictment was based, was, as construed by the court and applied to the undisputed facts, in violation of the several constitutional provisions specially relied on.

Fifth, the court erred in not directing a verdict for defendant, on the ground that the proof failed to sustain the indictment.

BRIEF OF THE ARGUMENT.

I.

The court misconstrued the executive order upon which the indictment was based as applied to the undisputed facts.

II.

The court erred in not permitting defendant to show what were its costs and profits.

III.

The court erred in overruling the motion of defendant to quash the indictment and each and every count thereof, for the reasons that—

(a) The indictment and each of its several counts is insufficient in law and fact.

(b) The allegations of the indictment are indefinite as to material matters and were not sustained by the evidence.

IV.

The court erred in overruling the demurrer of defendant to the indictment, which attacked the constitutionality of the Act of Congress of August 10, 1917, commonly known as the "National Defense" (Lever) Act (40 Stat. 278), and the executive order of the President, dated August 23, 1917, for the reasons, that—

(a) They violate the fifth amendment to the Constitution of the United States in that, defendant is deprived of its property without due process of law.

(b) The Act of Congress violates Section 1, of Article 1; Section 1 of Article 2, and Section 1 of Article 3 of the Constitution of the United States, in that it delegates legislative and judicial powers to the President of the United States, to the United States Fuel Administrator appointed by the President, and the Federal Trade Commission.

ARGUMENT.

I.

The court misconstrued the executive order upon which the indictment was based, as applied to the undisputed facts.

By Section 25 of the National Defense (Lever) Law, approved August 10, 1921, it was provided:

"That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, whenever and wherever sold, either by producer or dealer, to establish rules for the regulation of, and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers,

domestic or foreign; said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary."

By an order issued August 21, 1917, effective that day, the President fixed a scale of prices for bituminous coal at the mines in most of the coal producing districts. The price fixed for the kind of coal involved in this case, to-wit: West Virginia run-of-mine, was $2.00 per ton of 2,000 lbs. f. o. b. mines.

On August 23, 1917, the President issued an order fixing the price on anthracite coal throughout the anthracite producing regions, to become effective September 1, 1917. The same order contained the "Jobber's Margin," and provided:

"1. A coal jobber is defined as a person (or other agency) who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, or through his own vehicle, dock, trestle or yard.

2. For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15c per ton of 2,000 pounds, nor shall the combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal exceed 15c per ton of 2,000 pounds.

3. For buying and selling anthracite coal a jobber shall not add to his purchase price a gross margin in excess of 20c per ton of 2,240 pounds when delivery of such coal is to be effected at or east of Buffalo. For buying and selling anthracite coal for delivery west of Buffalo a jobber shall not add to his purchase price a gross margin in excess of

30c per ton of 2,240 pounds. The combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of anthracite coal for delivery at or east of Buffalo shall not exceed 20c per ton of 2,240 pounds, nor shall such combined margins exceed 30c per ton of 2,240 pounds for the delivery of anthracite coal west of Buffalo. Provided that a jobber's gross margin realized on a given shipment or shipments of anthracite coal may be increased by not more than 5c per ton of 2,240 pounds when the jobber incurs the expense of re-screening it at Atlantic or lake ports for trans-shipment by water."

The evidence shows without dispute that defendant bought the coal July 31, 1917, for $3.25 per ton f. o. b. mines, or $1.25 per ton more than the price f. o. b. mines fixed by the President's order of August 21, 1917; and that it sold it in August and September for $3.50 per ton.

The plain meaning of the executive order of August 23, 1917, is, that after the going into effect of that order, a jobber is prohibited from adding to his purchase price a gross margin in excess of 15c per ton "for the buying and selling of bituminous coal" and the order has no application to a transaction whereby a jobber, having bought coal prior to August 23, 1917, sells it thereafter. In other words, the order must be construed as prospective only, and prospective in respect to all of its elements; that is to say, to both the buying and selling of a given lot of coal.

It appears from the several orders of the President, which were judicially noticed by the court (R. 81) that on August 23, 1917, the President, under authority of the law, had adopted a comprehensive scheme, fixing

the prices at the mines throughout the country, for both bituminous and anthracite coals, and in connection therewith, provided the jobbers' margins for "the buying and selling" of both classes of coal.

The court below either treated the words "buying and," in the phrase "for the buying and selling of," as if they were not included in the order; or else the court has given to the order a retroactive operation, by holding that the "buying" of a particular shipment by a jobber, which is an essential part of the offense and necessary to constitute it, may be punishable, although it occurred prior to the enactment of the law.

By the order of August 23, in the first section thereof, the President carefully defined coal jobbers, in a clause inserted only for the purpose of so defining those words and complete in itself. Having thus defined, or described **the persons** (*descriptio personae*) who are capable of committing the specific offense, the President proceeded to define **the acts** which constitute the offense. Both in respect to the dealings in bituminous coal by a single jobber, or several jobbers; and in respect to dealings in anthracite at or east of Buffalo and anthracite west of Buffalo, in each case, by a single jobber, or several jobbers, he separately and distinctly provided that it was **"for the buying and selling"** that the jobber should add to his purchase price not more than a particular "gross margin."

In doing so the President must be supposed to have had in mind the nature of a jobber's business, and his necessary relationship to a given transaction. A jobber does not produce coal and sell it, but buys it and sells it. The transactions whereby he purchases, nec-

essarily involve an expense to him just as much as do the transactions whereby he sells with the additional intermediate expense which results from carrying unsold coal, equal in any event to the loss of interest on the money invested. In respect to his business of purchasing and carrying he is entitled to his cost and compensation for his services.

Having these facts in mind, the President wisely and fairly treated the relationship between a jobber and a particular transaction, or to use the words of the order, his relation to "a given shipment or shipments" as a unit. No permissible legal construction of the order can be adopted, which attributes to the President an intention to limit a jobber to a gross margin in the selling of a particular shipment, which might well be less than the expense already incurred by him in the purchase thereof, prior to the promulgation of the order.

In the present case and in many possible cases there might be shipments of coal in the hands of jobbers on August 23, 1917, theretofore purchased by them, in respect to which their expense connected with the purchase and carrying already exceeded the gross margin of 15c permitted by the order of that day. If the order of that day had the effect of compelling such jobbers to dispose of such shipments at a loss, or in the alternative, subject themselves to the penalties against "hoarding" provided in Section 26 of the law, the law itself would be open to grave constitutional objections. Whereas, no such objections could be raised, if the order is prospective only, and to be applied only to such jobbers as might see fit after the promulgation of the order, to engage in the business "of buying and selling."

We have already referred to the fact that by the two orders of August 21st and August 23rd, the President adopted a comprehensive schedule of prices for coal, both bituminous and anthracite, at the mines, throughout the country. We submit that the adoption of such a schedule of prices, taken in connection with the clear wording of clauses 2 and 3 of the order of August 23rd, shows that it was for the **buying and selling thereafter of coal**, the price of which at the mines was that day fixed, that the jobbers' margins were fixed.

This construction indicates a comprehensive, intelligible purpose, and gives effect to all the words of the order according to their plain English significance.

All of the sales by defendant, covered by the indictment were in the months of August and September, but the offense of which defendant was convicted was not the offense charged in the indictment or defined by any order in force in August and September, but was, if anything, an offense in violation of a subsequent order of October 6, 1917, of which Paragraph 9 provided:

> "A jobber who, at the time of the President's order fixing the price of the coal in question at the mine (the order of August 21), had contracted to buy coal at or below the President's price, and at that time had no contract to sell such coal, shall not sell the same at a price higher than the purchase price plus the proper jobber's commission as determined by the President's regulation of August 23, 1917."

The issuance of the order of October 6 shows conclusively that prior to that day it was not considered an

offense for a jobber who had purchased coal prior to August 23 to sell the same at any price obtainable on the market.

The principle is well established that laws, especially laws creating crimes, are not to be given a retroactive effect unless the legislative intention that they shall have such effect is clear. This is especially true when the retroactive construction throws doubt upon the constitutionality of the law.

The very recent case of *Schwab* v. *Doyle*, Collector of Internal Revenue, 42 Supreme Court Reporter 391, decided May 1, 1922, involved the question of the retroactive construction of a law of the United States, and this court held:

> "1. Laws are not to be construed as applied to cases which arose before their passage, unless that intent be clearly declared, since there is absolute prohibition against such law when their purpose is punitive, and the situation which impels prohibition in such cases exacts clearness of declaration in other cases."

At page 392 of the opinion this court said:

"The act of September 8, 1916, is within the condemnation.

There is certainly in it no declaration of retroactivity, "clear, strong, and imperative," which is the condition expressed in *United States* v. *Heth*, 3 Cranch, 399, 413 etc.

If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases that that which rejects retroactive operation must be selected."

The learned District Judge was of opinion (see Ruling on Motion for a New Trial, R. 36) that because it was stated as a recital of fact in one of the orders of the Fuel Administration (Order of November 8, 1917) that the "coal mine output was largely contracted to be sold in advance," that the order of August 23, if not construed so as to penalize the sale by jobbers thereafter, of coal previously purchased by them, would leave it "open to the jobber to demand what he could get for his coal, and to thus carry on the injurious speculation, manipulation and private control of the supply which the Act was designed to prevent."

We submit that this is not a permissible method of legal reasoning for the construction of a law creating a criminal offense. There is nothing to indicate that when the order of August 23 was issued, the President had any information concerning the amount of coal at the mines already contracted for, or whether the condition in fact existed on August 23. In any event, and even assuming that the condition did exist, by reason of the fact that only eleven days had elapsed since the passage of the Lever Law, and there had been no intervening investigation, it seems clear that he was not in possession of any such information.

II.

The Court Erred in Not Permitting Defendant to Show What its Costs and Profits Were.

If we are right in our first contention, the judgment should have been reversed and it would be unnecessary for the court to consider the other assignments of error. If we are not correct in that argument, the question

remains whether the defendant was not entitled to show that 15c per ton added as its commission to its purchase price resulted in loss or inadequate compensation.

The order of August 23, 1917, provides in terms that "For the buying and selling of bituminous coal, a jobber shall not add to his purchase price a gross margin in excess of 15c per ton." But the question is whether the President had power under the law to limit the "gross margin" or commission of the jobber to a commission which resulted in no compensation adequate to the jobber's services, or as in this case to a loss because the selling price averaged less than the cost. The question was raised at the trial by the request for Special Charge No. 2. (R. 82):

> "If you find from the evidence that the gross margin of 15c per ton for jobbers as fixed by the President on August 23rd, 1917, does not include defendant's costs of doing business and a just and reasonable sum for profit, then I charge you as a matter of law that you must return a verdict of 'not guilty.'"

This charge was refused and exception reserved and is preserved by the third assignment of error (R. 94):

> "In sustaining the objection of counsel for the government to the defendant's offer to prove that the profit of The Matthew Addy Company, upon each and every transaction upon which the indictment and the several counts thereof were based was not in excess of 15c per ton of 2,000 lbs."

and in the sixth assignment (R. 95):

> "In charging the jury that the word 'profit' in the

indictment, at each of the places where said word appears, was the equivalent of the words 'gross margin,' and in charging the jury that they might return a verdict against defendant in the absence of proof that The Matthew Addy Company made a profit per ton on the coal covered by the indictment, in excess of 15c."

The Government offered no evidence to show that any part of the commission or margin of 25c, added by defendant to its purchase price, was profit.

The defendant offered to show and had incorporated into the record in connection with the evidence of Frank C. Deckebach (R., 75), a certified public accountant, comprehensive tabulations from its books showing the cost and expense of its business in cents per ton, not only for the months covered by the indictment, but prior and subsequent thereto. In the nature of things it was impossible to distribute and allocate to the particular shipments involved in the indictment, the proper proportion of the company's total expenses rightly allowable as selling cost. But by a distribution of all costs against all sales, it was shown that for the month of July, 1917, the cost of selling a ton of coal was $.3425, or more than 9c over the total commission of 25c which the company added to its selling price of the coal purchased by it from Bluefield Coal and Coke Company for $3.25 per ton on July 31, 1917 (Government Exhibits 1 and 2, R., 102). For the month of August, 1917, the company's selling cost per ton was $.1457, or a fraction of a cent less than the 15c per ton commission allowed by the executive order. For the month of September the company's selling

cost per ton was $.1790, or nearly 3c in excess of the commission allowed. The evidence was rejected, the special charge refused, and the jury instructed that the results of the purchases and sales by defendant by way of profit or loss were immaterial.

We have already quoted, at page —, the section of the Act which authorizes the President to fix the price of coal and coke, and provides that such "authority and power may be exercised by him in each case through the agency of the Federal Trade Commission," etc. In overruling a motion to quash the indictment the District Judge held that the word "may" in this clause is permissive, and that the President is not required to exercise his authority to regulate the prices through the Federal Trade Commission; and the judgment below was a conviction upon the order of the President of August 23, not concurred in or promulgated by the Federal Trade Commission.

In order to properly construe the law it should be noted that where the Federal Trade Commission undertakes to fix prices, it must, under Paragraph 11 of Section 25, "make full inquiry, giving such notice as it may deem practicable, into the cost of producing," etc., and that having completed such inquiry it shall (Par., 14):

> "In fixing maximum prices for producers * * * allow the cost of production, including the expense of operation, maintenance, depreciation, and depletion, and shall add thereto a just and reasonable profit."

and in Paragraph 15 it is further provided that:

"In fixing such prices for dealers, the Commission shall allow the cost to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction."

The purpose and intent of the law as a whole was not to confiscate, during a public emergency, either the product of the producer or the good will or services of the dealer or jobber, but to regulate prices after inquiry, and under the ordinary constitutional limitations. And even if it be true that the immediate emergency justified the President in fixing jobbers' prices, instead of adopting the slower method of submitting them to the Federal Trade Commission to be fixed upon investigation, we submit that the President, in exercising such power in emergency, was not free from the limitations imposed upon the Federal Trade Commission in the event that it should exercise the same powers by direction of the President.

We submit that where the President, without investigation, fixed a dealer's or jobber's price, without allowing "the cost to the dealer and adding thereto a just and reasonable sum for his profit," the dealer or jobber may show upon an indictment based upon Paragraph 17, for violation of an order of the President, that the price fixed by the order did in fact not allow "a just and reasonable sum for his profit in the transaction," but actually resulted in a loss.

III.

The court erred in overruling the motion of defendant to quash the indictment and each and every count thereof.

(a) The indictment and each of its several counts, is insufficient in law and fact.

The District Judge, in his opinion of February 26, 1920, overruling defendant's motion to quash the indictment (R., 28), disposed of our first contention on this point in the following language:

> "The indictment is sufficient. The word 'may' in the last clause of the first paragraph of Section 25 of the National Defense (Lever) Act (40 Stat., 276) is permissive. The President is thereby empowered, not required, to exercise his authority to regulate the prices and production of coal through the Federal Trade Commission in each instance. This is the ordinary significance of the word. *U. S.* v. *Lexington Mill Co.*, 232 U. S., 399, and that it was so intended is clear from the context. It may be noted that the third paragraph vests in the President a similar optional discretion to act through the Commission or otherwise."

We submit that this construction of the law is not correct.

Paragraph one, which authorized and empowers the President to fix the price of coal and coke, and to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment or storage, is a startling innovation in legislative

action, due to the exigencies of war. If Paragraphs 1 and 17 had stood alone, without the inclusion of the intermediate paragraphs, the construction adopted by the District Court might have been necessary, but reading the section as a whole we submit that there was no intention on the part of Congress to authorize the President to fix, without investigation or appeal, either prices or jobbers' commissions on the sale of coal and coke. This is apparent from the provisions of the sections other than 1 and 17.

Paragraphs 2, 3 and 4 relate to the requisition of "the plant, business and all appurtenances * * * belonging to such producer as a going concern," and their operation during the period of the war.

Paragraph 3 provides that in case of such requisition "a just compensation for the use thereof" shall be paid, which compensation the President shall fix or cause to be fixed by the Federal Trade Commission, and Paragraph 4 provides that in case of requisition, if the compensation fixed be not satisfactory to the owner, he shall, upon payment to him of 75 per cent. of the amount fixed, "be entitled to sue the United States to recover such further sum as, added to said seventy-five percentum, will make up such amount as will be just compensation."

Paragraphs 6, 7 and 8 provide an alternative to requisition of the plants of producers and dealers. That is, "an agency to be designated by the President," to which producers shall sell their products, the prices to be fixed and regulated by such agency.

By Paragraph 8 it is provided that:

> "The prices to be paid for such products so purchased shall be based upon a fair and just profit over

> and above the cost of production, including proper maintenance and depletion charges, the reasonableness of such profits and costs of production to be determined by the Federal Trade Commission,"

with further provision that in case the owners are dissatisfied with the prices so fixed, they shall be paid seventy-five percentum of the amount, with the right to bring suit to recover the actual value of their product, to be determined by the courts.

Paragraphs 11, 12, 13, 14 and 15 prescribe the procedure whereby the Federal Trade Commission, when directed by the President, is to make inquiry into the cost of producing coal and coke, and Paragraph 13 provides that "If the President has decided to fix the prices at which any such commodity shall be sold by producers and dealers generally" the Federal Trade Commission shall "fix and publish maximum prices for both producers of and dealers in any such commodity," etc.

Paragraph 17 provides a punishment for any one who, with knowledge that the prices of any such commodity have been fixed as herein provided, violates them.

The Federal Trade Commission is required by Sections 14 and 15, in fixing maximum prices, both for producers and dealers, to allow the cost of production, or service, and "add thereto a just and reasonable sum for the profit in the transaction." We submit that Paragraph 1, properly construed, and considered as a part of the entire statute, cannot be casually disposed of by merely defining "may" therein as permissive; that the proper construction of Paragraph 1, conferring unusual powers upon the executive, also defined the only manner in which such powers could be exercised, and that the

word "may" is equivalent, as it frequently is, to the word "shall," and refers to the special requirements of Paragraphs 11, 12 and 13, inclusive, in providing the method whereby the President is authorized to fix prices for "producer or dealer."

Paragraph 16 strongly enforces our contention as to the proper construction of the statute. It reads:

> "The maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of the maximum prices by the commission."

During the course of the trial it was recognized that this paragraph was applicable to the maximum commission fixed by the President, for violation of which defendant was indicted. But the paragraph did not undertake to preserve the inviolability of the contracts as against prices fixed by the President, but only as against prices fixed by the commission. If the Government's construction of Paragraph 1 is correct, there would appear to be no sound rule of construction which would permit Paragraph 16 to make an exception to the unlimited power conferred on the President by Paragraph 1.

If our construction of the statute is correct it follows that—

The indictment should allege the passage of the Act and the principal provisions thereof and then that the President having decided to fix prices at which coal and coke might be sold, that the Federal Trade Commission fixed and published maximum prices for dealers in such commodities and that after such prices were fixed and

published, defendant, with knowledge thereof violated same by asking, demanding and receiving higher prices than those fixed.

Nowhere in the indictment does it appear that the Federal Trade Commission fixed and published maximum prices and that defendant had notice thereof. If the Federal Trade Commission did not in fact fix and publish maximum prices and defendant did not in fact know or could not have known of any fixing of prices by it, then the defendant has violated no law and should not have been compelled to plead to any such indictment.

It is a well recognized rule in criminal pleading, that no material allegation may be omitted, for without it, a criminal offense is not described.

In the case of *United States* v. *Hess,* 124 U. S., 483, at page 486, it was held:

> "The general, and, with few exceptions, of which the present is not one, the universal rule on this subject, is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially, or by way of recital."

See also *Ledbetter* v. *United States,* 170 U. S., 606.

The rule just quoted applied equally to common law offenses as to statutory offenses. In an indictment for a purely statutory offense, the reason for the rule is all the more evident, for a common law crime may become

defined through legislative and judicial interpretation, besides the influence of public opinion expressed regarding the law, during many years of its effectiveness.

IV.

The court erred in overruling the demurrer of defendant to the indictment, which attacked the constitutionality of the Act of Congress of August 10, 1917, commonly known as the "National Defense (Lever) Act" (40 Stat. 278), and the executive order of the President, dated August 23, 1917.

(a) The Act of Congress and the rules, regulations, promulgations and publications of the President and the United States Fuel Administrator violate the fifth amendment to the Constitution of the United States, in that defendant is deprived of its property without due process of law.

The first clause of Section 25 of the Act, gives the President authority to fix the price of coal and coke. The eleventh clause provides that when directed by the President, the Federal Trade Commision is required to inquire as to the costs of production of coal and coke. The thirteenth clause provides that if the President has decided to fix prices and the Federal Trade Commission has completed its inquiry, **the Federal Trade Commission shall fix and publish maximum prices, which prices shall be observed by all producers and dealers** (black type ours).

Then in the fourteenth and fifteenth clauses, it is provided how maximum prices shall be arrived at. The seventeenth clause prescribed the penalty for not complying with the prices as fixed.

There is nothing in the Act of Congress nor in the regulations of the President thereunder, as they were construed and applied by the District Court, which provide for a hearing with regard to the fixing of prices. There is not even any semblance of a hearing either before the President or the Federal Trade Commission or a court. The President by himself or through the Federal Trade Commission may arrive at a price to be fixed, no matter how arbitrary or unreasonable, and every one within the meaning of the Act must comply therewith. This is a taking of one's property or services without compensation and is purely confiscatory and within the prohibtion of the amendment to the Federal Constitution. Assuming that the President has power to act without action by the Federal Trade Commission, there is nothing in the Act of Congress which provides for the machinery to arrive at the costs of production. It is true the President may, if he sees fit, exercise his power through the agency of the Federal Trade Commission and the Federal Trade Commission may make inquiry as to the costs of production, but how they shall arrive at such costs of production, is not stated except that the Act in Clauses fourteen, fifteen and sixteen of Section 25 provides, "that in fixing maximum prices for producers, the commission shall allow the costs of production, including the expense of operation, maintenance, depreciation and depletion and shall add thereto a just and reasonable profit."

That in fixing such prices for dealers, the commission shall allow the costs to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction.

That the maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith prior to the establishment and publication of maximum prices by the commission.

In the motion to quash the indictment (R. 29), which was overruled by the court, we contended that the word

"may" as used in the first paragraph of Section 25, of the Act of Congress in question should be read as "shall." That it was obligatory upon the President in all cases to exercise his authority therein vested in him, through the agency of the Federal Trade Commission.

The court below construed the phrase mentioned as being permissive on the part of the President, to exercise his authority through the agency of the Federal Trade Commission.

If the court's ruling on the motion to quash the indictment is correct, and as the Act of Congress in question nowhere provides for an investigation by the President nor for any semblance of a hearing before him, the Act of Congress in question is clearly invalid, as depriving defendant of its property without due process of law, and besides, the fact remains that the President has not exercised his authority through the Federal Trade Commission, which might have the machinery to provide for a hearing.

While the President is given the power to exercise his authority through the Federal Trade Commission, it is very apparent from his rulings and regulations, beginning with the first one under date of August 21, 1917, that he has not seen fit to use the agency of the Federal Trade Commission and that he has arbitrarily arrived at the maximum prices which he fixed in exercising that authority himself.

Nowhere in the Act of Congress nor in any of the rulings and orders of the President, or the United States Fuel Administrator, is there a remedy provided for defendant, in the event that the prices as fixed were found not to include the cost of doing business, together with a fair profit, which the Federal Trade Commission is enjoined to allow dealers, when it (The Federal Trade Com-

mission) investigates the cost of doing business and publishes maximum prices after the President has decided to fix prices of coal and coke.

Unlike the provision made in the Act of Congress, for producers, who, in the event that their properties and output are commandeered by the President, may sue the United States, the defendant as a jobber, is entirely without remedy and if it exercises the privilege of charging a price which covers the cost of doing business, plus a fair profit, as the law intended for it to have, it is amenable to criminal proceedings, which impose a very heavy penalty.

If the Law authorizes the President, by mere executive order without previous investigation to finally fix the jobber's compensation for his services without provision for appeal, and does not permit the defendant to show upon the trial that the compensation so fixed is unfair and inadequate, the law is unconstitutional. Due process of law, as granted by the constitution, is not dependent upon the form of procedure, but there must be provided some fair method, either in advance or afterwards, for compensating the person whose property is taken, or whose service is compelled, for public uses.

It may be that where, upon investigation and hearing, a jobber's commission had been fixed for the trade in general, a particular jobber could not complain because of the fact that by reason of circumstances peculiar to him, the commission so fixed did not afford him adequate compensation. (See remarks of the District Judge, R., 78.) But in this case there was no hearing or investigation prior to the order fixing the jobber's commission nor any pretense of any. The arbitrary jobber's commission

embodied in the order of August 23, became effective thirteen days after the passage of the law itself. On September 6 the United States Fuel Administrator, referring to the prices and commissions theretofore fixed, frankly stated that they had been fixed without investigation. He said: "The prices fixed are provisional. They will stand unless changed by order of the President for good cause shown. The Fuel Administration will examine all applications for revision of prices, accompanied by cost statements presented in writing." In fact they were afterwards changed several times and in many particulars.

The fixing of rates, charges or compensation for property taken, is certainly not an executive function. Where compensation for property taken is fixed by judgment of a court, it is always after hearing and investigation; where rates and charges are fixed by the Legislature it is at least always presumed that investigation has been made.

If the President or other executive officer may exercise such power without investigation as was done in the present case, at least it must be open to the citizen to show upon the trial that the enforcement of the order was confiscatory or non-compensatory as to him. This right was denied the defendant in this case.

The District Judge in his opinion on demurrer to the indictment admitted that under ordinary conditions, a law such as the Act of Congress of August 10, 1917, would be invalid because of want of due process of law and said:

> "It is true that the Act afforded no opportunity for judicial review of the reasonableness of the prices fixed by the President, and this has been determined

under ordinary circumstances, with reference to railroad and other rates, to be want of due process of law. *Chicago, Milwaukee & St. Paul Ry.* v. *Minnesota*, 134 U. S., 418, 10 Sup. Ct., 462, 702; Minnesota Rate Cases, 230 U. S., 352-434; *Oklahoma Operating Co.* v. *Love*, 252 U. S., 331; *Holter Hardware Co.* v. *Boyle*, 263 Fed., 134."

But the learned District Court further said:

"Public danger warrants substitution of executive process for judicial process. *Moyer* v. *Peabody*, 212 U. S., 78" (R., 32).

In its opinion affirming the District Court, the Court of Appeals quoted that part of the opinion of the District Court and concurred in its views. In this respect, we submit that both the District Court and the Court of Appeals were in error, and that such a holding is in direct variance with the salutary rule laid down by this court in the early case of *Ex parte Milligan*, 4 Wall., 2, 121-127; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S., 146-156, and the very recent case of *United States* v. *Cohen Grocery Co.*, 255 U. S., 81, 88-89.

In the Cohen case *supra*, this court speaking through Mr. Chief Justice White, at page 88 of the opinion said:

"We are of the opinion that the court below was clearly right in ruling that the decisions of this court undisputably establish that the mere existence of a state of war would not suspend or change the operation upon the power of Congress of the guarantees and limitations of the fifth and sixth amendments as to questions such as we are here passing upon (citing cases). It follows that, in testing the oper-

ation of the Constitution upon the subject here involved, *the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view.*" (Italics ours.)

While this court in the Cohen case held Section 4 of the Act of Congress of August 10, 1917, unconstitutional because of indefiniteness, and notwithstanding that the facts in that case were different than the facts in this case, in that in the Cohen case no prices were fixed, and therefore the question of what were reasonable prices was too indefinite and did not sufficiently inform the defendant of the charge against him, while in the case at bar, definite prices were fixed, nevertheless, the principle laid down by this court in the Cohen case, viz, that the existence or non-existence of a state of war or using the words of the District Judge, the existence or non-existence of "public danger," becomes negligible, and should be put out of view, and the usual rules with reference to the limitations of the Constitution upon the power of Congress and the chief executive should be applied. If as the District Court and the Court of Appeals admits, that under ordinary circumstances there is a want of due process of law, so far as this petitioner is concerned, then by applying the rule laid down by this court in the Cohen case, petitioner has been deprived of due process of law, notwithstanding this proceeding grew out of, and was during the existence of a state of war and based upon the Act of Congress passed during such state of war.

Our principal objection to the statute on constitutional grounds, as applied to the facts in this case, is not so much that the President was without power to fix the

broker's commissions, but that Congress was without power to authorize him to do so without investigation, and subject the defendant to criminal punishment without permitting it to show that the commission fixed was non-compensatory. In other words, we insist that property can not be taken for a public use, or services compelled for such use, without the right to have it determined somewhere and at some time, either in advance or afterward, whether the compensation provided is adequate.

(b) The Act of Congress violates Section 1 of Article 1; Section 1 of Article 2 and Section 1 of Article 3, of the Constitution of the United States, in that it delegates legislative and judicial powers to the President of the United States, to the United States Fuel Administrator appointed by the President, and the Federal Trade Commission.

The courts have uniformly held that rate fixing or price fixing is a legislative function. It has also been recognized that if the subject is one over which the state legislature or Congress has authority, it may regulate the use or even the price of the use of private property.

Interstate Commerce Commission v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S., 479, 505; *City of Knoxville* v. *Knoxville Water Co.*, 212 U. S., 1; Minnesota Rate Cases, 230 U. S., 352; *Field* v. *Clark, Boyd* v. *United States*, and *Sternback* v. *United States*, 143 U. S., 649.

CONCLUSION.

We respectfully submit that upon the showing made to this court, a writ of certiorari should be granted, directed to the Circuit Court of Appeals for the Sixth Circuit, requiring that the record of said cause in said court and the judgment be certified to this court, and that thereupon this court proceed to correct the errors complained of, reverse said judgment, enter final judgment and discharge petitioner, and grant such further relief as this court may deem just and proper in the premises.

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